Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

October Term, 1993

Robert A. Levy,
Petitioner,

vs.

University of Cincinnati
Allen Brown
Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Ohio First Appellate District

PETITION FOR WRIT OF CERTIORARI

Robert A. Levy

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Petitioner pro se

I

QUESTION PRESENTED

Whether a State appellate court denies an appellant due process of law under the Fourteenth Amendment when it affirms a summary judgment on grounds of an affirmative defense which was not pleaded, raised, or argued by the parties, on which no opportunity was afforded the parties to be heard, which is not supported by the facts or the law of the case, and under circumstances indicating inappropriate motives on the part of the appellate court.

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OPINION BELOW

The Decision and Judgment of the Ohio Court of Appeals, First Appellate District, issued 16 December 1992 (A1-A12), affirming the summary judgment of petitioner's lawsuit, is as yet unreported.

The Court of Appeals issued its Order denying reconsideration on 22 January 1993 (A27).

JURISDICTION

On 26 May 1993, the Supreme Court of Ohio entered its order denying review after judgment by the court of appeals (A28). Pursuant to 28 U.S.C. section 2101(c) and Supreme Court Rule 13.1, the present petition for a writ of certiorari was required to be filed within ninety days of the order of the Supreme Court of Ohio. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION CITED

1. The Fourteenth Amendment to the United States Constitution, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After briefing and hearing on Respondent University of Cincinnati's (UC's) motion for summary judgment in the Hamilton County Court of Common Pleas, Respondent UC was granted a summary judgment on all of Petitioner's claims (A13-A14). This judgment was affirmed on appeal ("Appeal-2", ___ Ohio App 3d ___, A1-A12). It is from the affirmation of this judgment that the Petitioner, Robert A. Levy, asks this Court to grant its writ of certiorari to the Hamilton County Court of Appeals.

The history of this case spans thirty years, from 1963 to 1993. The following is a brief review of the pertinent facts:

In the spring of 1963, while on a post-doctoral research appointment in the State of Israel, Petitioner initiated correspondence with Respondent UC with a view toward obtaining an academic teaching position. He received a letter dated June 10, 1963 (the June letter, A29-A33) from Professor W.R. Wright, head of the UC physics department, offering him a position as a visiting associate

professor of physics for the academic year beginning in September, 1963. Among other things the June letter provided that if Petitioner served two three-year appointments after his visiting appointment, he would have academic tenure. ("At the end of that time the faculty member has tenure", A29). By letter dated June 22, 1963 (A34), Petitioner accepted the offer embodied in the June letter.

Petitioner and his family traveled to Cincinnati, Ohio, taking up residence there in September, 1963, and he assumed his assigned duties as a faculty member in the Fall Quarter of 1963.

On December 4, 1963, Petitioner received a letter (the December letter, A35-A36) from the office of the Dean of the McMicken College of Arts and Sciences advising him that he had been appointed to a three-year appointment as Associate Professor of Physics (retroactive from September 1, 1963, to August 31, 1966). The December letter contained a statement implying that he knew that he would have tenure at the end of his second three-year term only at the option of the University. Although the December letter was ostensibly signed by the dean, the signature was not his.

Petitioner served two three-year appointments as Associate Professor of Physics. In December, 1965, he was awarded Patent No. 3,223,932 from the U.S. Patent Office. During the next two years he wrote a textbook,

Principles of Solid State Physics, which was published in 1968 by Academic Press, New York, and adopted as a text by numerous colleges and universities. However, instead of continuing as a tenured faculty member after the end of his second re-appointment, his employment was terminated as of August 31, 1969.

On August 22, 1975, Petitioner, having been unable to secure employment since his termination by UC, filed a complaint against UC in the court of common pleas of Hamilton County (case No. A-756855) alleging contract and tort claims. He attached a copy of the June letter to his complaint. This complaint was subsequently amended to join the Teachers Insurance and Annuity Association, College Retirement Equities Fund (TIAA-CREF) and Allen Brown as party defendants. On June 13, 1977, the court of common pleas dismissed the tort claims against the university and dismissed Brown as a party defendant. UC filed no responsive pleading, but on August 11, 1977, filed a motion for summary judgment on Petitioner's remaining contract claims. Petitioner filed a response, attaching the December letter (and a letter dated October 14, 1965) as evidence that he had served two three-year appointments pursuant to the terms of the June letter. On November 15, 1977, the trial court entered summary judgment dismissing Petitioner's contract claims against Respondent UC.

On September 15, 1982, the trial court, without prior notice to Petitioner, dismissed his remaining claims for lack of prosecution. Petitioner did not learn of the final

judgment until after time for appeal had expired, and after several false starts he instituted a complaint for a writ of mandamus in the Hamilton County Court of Appeals (Case No. 850161), which was dismissed on April 30, 1985. Petitioner then appealed to the Supreme Court of Ohio (Case 85-942), which reversed and allowed the writ of mandamus to compel the trial court to reactivate Petitioner's original claim (case No. A-756855), on the basis that his original action was wrongfully dismissed, *Levy v. Morrissey*, 25 Ohio St 3d 367, 496 NE 2d 923 (Ohio 1986). Justices Celebrezze, Sweeney, Locher, Holmes, Brown, and Wright concurred in the decision, with Justice Douglas dissenting.

Thereafter Petitioner settled his claims against TIAA-CREF, and after entry of final judgment, Petitioner appealed to the Hamilton County Court of Appeals.

In his briefs and at oral argument, Petitioner argued that the December letter and the second re-appointment letter showed that he had satisfied the conditions set forth in the June letter to obtain academic tenure. Respondent UC argued that the sentence in the June letter "At the end of that time the faculty member has tenure" did not mean what it said. Petitioner in his Reply Brief pointed out that said sentence was consistent with the 1940 Statement of Principles of the American Association of University Professors (AAUP), which provides that when a faculty member has served seven years, he is automatically entitled to tenure. Because the December letter made Petitioner's first three-year appointment retroactive to

September 1, 1963, Petitioner ended up serving only six years. Respondent UC never mentioned the December letter in the summary judgment proceedings in the trial court or in its briefs or oral argument in the court of appeals.

In a Decision dated November 4, 1987 ("Appeal-1", A15-A26, unpublished), the court of appeals reversed the dismissal of all of Petitioner's claims but denied judgment to Petitioner because he had not filed a motion for summary judgment. The judges on the panel which rendered the decision were Raymond E. Shannon, Rupert A. Doan, and Eugene J. Utz.

After remand to the court of common pleas Respondent UC obtained leave after hearing to file its answer instanter to Petitioner's first amended complaint, and Petitioner's motion for partial summary judgment (for UC's failure to file an answer) was denied.

UC's answer consisted of three defenses: 1) a denial of specific paragraphs of Petitioner's complaint, 2) the defense of failure to state a claim upon which relief can be granted, and 3) the defense of the statute of limitations. The defense of novation was not raised or mentioned.

On August 30, 1989, a member of the panel in Appeal-1 (and later in Appeal-2), The Honorable Rupert A. Doan, sitting as a member of the Supreme Court of Ohio, wrote the opinion in *Omlor v. Cleveland State University*, 45 Ohio St. 3d 187, 543 NE 2d 1238 (Ohio

1989), a case involving academic tenure. The syllabus of this opinion stated as follows:

> "A nontenured faculty member of a university has no entitlement to tenure on a de facto basis where the university has a formal tenure system which provides that tenure may be obtained only by formal grant of such privilege."

Immediately thereafter, on September 18, 1989, UC submitted a Request for Admissions on Petitioner, asking among other things that he admit having received the December letter. When Respondent UC filed its answer in 1990 to Petitioner's second amended complaint, it still did not raise or mention the defense of novation.

Trial in the case was originally set for October 10, 1989, but because of sua sponte actions by the trial court and motions by UC, it was postponed to April 22, 1991. On motion of UC filed April 1, 1991, the trial date was converted to a hearing date on UC's motion for summary judgment.

At the hearing and in his opposition papers petitioner argued that the June letter provided that he would have tenure at the end of his second term; that the University was wrongfully trying to change the conditions under which he would acquire tenure from "You will have tenure after two three-year terms" to "Maybe you will have tenure after two three-year terms." Petitioner also argued that the

Omlor case did not apply in his case.

UC argued, as it did in the 1977 summary judgment and in Appeal-1, that the June letter was nothing more than a one-year appointment and UC could offer a subsequent appointment on any terms it wished. It now argued that the December letter represented such a subsequent appointment. UC also asserted that the *Omlor* decision (supra) invalidated any claim Petitioner made regarding tenure. UC's counsel pointed out that the overriding issue in the case was the prospect of the large amount of money UC would have to pay if Petitioner won the case: "... was this man entitled to tenure or wasn't he, because, if he had to receive tenure from the University, they would be paying him for the next 30 years or whatever it is, so that's the real significant issue here."

The issue of novation was never mentioned by Respondent, by Petitioner, or by the Court.

The Finding of the Court, sustaining UC's motion for summary judgment, was entered September 13, 1991. Final summary judgment was entered on November 4, 1991. Neither the Finding of the Court or the Entry Granting Summary Judgment gave any reasons for the granting of summary judgment to UC.

Petitioner again appealed to the Hamilton County Court of Appeals; the case was placed on the accelerated calender, which would have permitted summary disposition of the appeal, but at Petitioner's request was

transferred to the regular calendar. Oral argument was held on July 13, 1992. At the beginning of oral argument, the court requested that the parties comment on the following topics:

Fact questions regarding tenure,
Fact questions regarding statutes of limitations,
Significance of the first appeal (Appeal-1),
The *Omlor* case - does it control, and
The matter of defendant UC's motion for leave to file its answer instanter.

The issue of novation was never brought up, by the court, by Petitioner, or by Respondent. After oral argument, Petitioner filed a motion for leave to file a supplementary brief on the issue of the significance of the *Omlor* case (supra), but his motion was denied.

In its Decision dated December 16, 1992 (Appeal-2, A1-A12), the court of appeals affirmed the summary judgment of Petitioner's contract claims on two grounds:

1. It asserted sua sponte, without any supporting authority, that the December letter constituted a novation of Petitioner's contract of employment as a matter of law (A7):

> "The flaw in the reasoning of the appellant results from his failure to recognize the legal significance of the December letter.
>
> "The December letter is more than a modification of the June letter; it entirely

> replaces the June letter. It establishes new rights and obligations and is, in legal effect, a contract of novation offered by U.C. and accepted by the appellant by his action of continuing to teach after the expiration of the period of employment established by the June letter." (Emphasis added).[1]

2. It asserted that the *Omlor* case (supra) held that tenure could only be acquired through explicit action of the board of directors of the university (A7).

The judges on the panel which rendered the Decision were Rupert A. Doan, Eugene J. Utz, and Harry T. Klusmeier.

Petitioner filed a motion for reconsideration which was denied on January 22, 1993 (A27).

On January 14, 1993, Petitioner filed a notice of appeal to the Supreme Court of Ohio in the court of appeals alleging the existence of constitutional questions; his memorandum in support of jurisdiction in the Supreme Court of Ohio was filed on February 12, 1993; his appeal

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[1] In an apparent effort to make the December letter look more like a novation, the Decision altered the wording to say that petitioner's appointment had been changed from Visiting Associate Professor to Associate Professor "for the same period of time" (A2). (Compare actual wording, A35).

was dismissed sua sponte by the Supreme Court on May 26, 1993,[2] on grounds that there were no substantial constitutional issues (A28).

From the Hamilton County Court of Appeals' Decision, the petitioner, Robert A. Levy, files the instant petition in this Court.

RAISING OF FEDERAL QUESTION

Appellant's Notice of Appeal to the Supreme Court of Ohio, filed in the Court of Appeals on January 14, 1993, and in the Supreme Court on February 12, 1993, contains the statement "The appeal presents substantial constitutional questions."

The first proposition of law in appellant's Memorandum in Support of Jurisdiction in the Supreme Court of Ohio states, "When the affirmative defense of novation is not pleaded, raised, or argued by either party in a summary judgment proceeding in the trial or appellate court, it is an abuse of discretion and a denial of due process for an appellate court to affirm a summary judgment on the basis of novation."

The text of said First Proposition of Law pointed out that the doctrine of due process arises from the Fourteenth

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[2] By January, 1993, four of the six members of the Supreme Court of Ohio that voted to reactivate petitioner's case had left the Court.

Amendment of the U.S. Constitution; it quoted from *Simon v. Craft*, 45 L Ed 1165, defining due process as notice and an opportunity to defend, and noted that Rule 8(C), Ohio Rules of Civil Procedure, embodied this doctrine as it applied to affirmative defenses such as novation, and the affirmation by the court of the summary judgment on the basis of novation amounted to a denial of due process to appellant.

The Supreme Court of Ohio denied jurisdiction, stating that "the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein."

ARGUMENT

This petition presents a case of flagrant violations of federal constitutional law by a reviewing court. The Court of Appeals of Ohio, First Appellate District (The Hamilton County Court of Appeals, or "court of appeals"), by its unconscionable behavior, has denied petitioner the protection of due process of law under the Fourteenth Amendment.

Although due process under the Federal Constitution does not require a State to provide appellate review as long as due process has been provided in the court of first instance, once a State provides appellate review, it must do so in a manner that is consistent with due process at all

stages of the proceedings, *Griffin v. Illinois*, 351 US 12, 100 L ed 891, 76 S Ct 585, 55 ALR 2d 1055, *Frank v. Mangum*, 237 US 309, 327, 59 L ed 969,980, 35 S Ct 582. Although *Griffin v. Illinois* and *Frank v. Mangum* were criminal cases, the same doctrine applies to civil cases (see for example *Lindsey v. Normet*, 405 US 56, 31 L Ed 2d, 36, 92 S Ct 862).

In the instant case, the trial court proceedings were limited to a summary judgment hearing, and the court made no analysis, either in its finding or in its judgment (A13-A14), of the issues raised by the parties, but simply found in favor of the moving defendant. It was not until the matter was appealed that the issues were even discussed by a court. Since a summary judgment appeal amounts to a de novo consideration of the issues, the doctrine that at all stages of the proceedings the Due Process clause should protect litigants from invidious discrimination is particularly applicable.

The Decision of the court of appeals in Appeal-2, declaring the December letter to be a contract of novation (A7) without allowing petitioner to be heard on the issue amounted to a denial of petitioner's right to due process of law.

Since novation is an affirmative defense and must be so pleaded, and was never pleaded, argued in the summary judgment papers, or argued in the subsequent appeal by the parties, it was waived as a defense by Respondent UC and could not legally have formed the basis by which the

court of appeals could affirm the summary judgment.

Although there have been cases where an appellate court has raised an affirmative defense sua sponte for the purpose of affirming a summary judgment (not novation however), [see for example *Russell v. Sunamerica Securities, Inc*, 962 F2d 1169, 1172 (5th Cir. 1992)], it was done only after giving the parties an opportunity to be heard. In *Russell*, the court of appeals requested supplemental briefing on the issue (of res judicata), at 1173.

Contrast this with the instant case; here there was no hint of any kind that the issue of novation was ever under consideration--by UC, by petitioner, or by the court. If the court of appeals had novation on its mind, it should have asked for briefing on the matter, or at the very least asked the parties to comment on the issue at oral argument.

The court did in fact ask the parties to address several issues at oral argument, but novation was not one of them. This litigation by stealth[3] goes to the essence of procedural due process for it denies a party notice and an opportunity to be heard, *Simon v. Craft*, 45 L Ed 1165.

Moreover, the December letter cannot possibly be construed as a contract of novation, the most glaring defect

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[3]Respondent UC co-operated by refraining from pleading the affirmative defense of novation.

being that it does not even state the amount of petitioner's salary; it changed only one aspect of petitioner's contract, namely the conditions under which he could achieve tenure. The matter of consent was a question of fact which could not be decided in a summary judgment proceeding, and the crucial element of consideration was totally lacking. Novation is a complicated issue, with several elements needed to establish its existence, see for example *Charles Kahn & Company v. Sobery*, 355 F Supp 156, 162 (1972); it cannot be summarily decided as in Appeal-2. A law-of-the-case argument based on the Decision in Appeal-1 would also eliminate the construction of the December letter as a novation, *Pyramid Life Insurance Co. v. Curry*, 291 F 2d 411, 413 (see section on aggravated circumstances, infra).

Petitioner was severely prejudiced by this action because not only did he lose his central claim (to academic tenure), but the court of appeals used the novation conclusion to eliminate many of petitioner's secondary claims, such as entitlement to promotion (A7) and arguments against statute of limitations defenses (A8).

In order for a procedural due process claim to stand up, not only must the claimant have been denied his right to be heard, but he must also not have had adequate state remedies to redress his grievance, *Amsden v. Moran*, 904 F 2d 748, 755 (1st Cir. 1990). For this reason, due process claims against the actions of a court, as opposed to an agency, or the provisions of a statute, appear to be rare.

In the instant case it might be argued that even though petitioner had no opportunity to be heard on the novation defense, he had the opportunity to be heard in his application for reconsideration and again in his appeal to the Supreme Court of Ohio.

The problem with this argument is that in the judicial system, review usually becomes more limited at each higher step in the process. It is rare that an application for reconsideration is granted; moreover no reason need be given for denial of reconsideration, as happened for petitioner's application (A27).

Furthermore, reconsideration consists of review by the same entity that committed the wrong in the first place, an inherently questionable remedy, particularly so in this case, where the court knew or certainly should have known that it was acting in violation of basic fairness and of its own rules (Civ. R. 8(C), Ohio Rules of Civil Procedure). Its behavior at oral argument, when it asked for comment on every subject under the sun except novation, shows that it was deliberately excluding the petitioner from being heard on the matter. A petition for reconsideration to such a panel hardly satisfies the requirements of procedural due process.

The remedy of subsequent appeal to the State Supreme Court is limited since the merits of the case cannot be argued unless the court accepts jurisdiction, which in this case it did not (A28).

Furthermore, the reviewing process for an action of an appellate court is basically flawed, at least insofar as petitioner's allegation is concerned, because no opportunity to present evidence to oppose the novation defense is available, either at reconsideration in the court of appeals or in a request for jurisdiction in the Supreme Court.

It is thus clear that there was a taking of petitioner's property (dismissal of his lawsuit) without his being accorded procedural due process of law by the court of appeals.

AGGRAVATING CIRCUMSTANCES

Petitioner charges further that the court of appeals, acting on behalf of Respondent University of Cincinnati, threw out all pretense of fairness and impartiality, and arranged, over a five-year period, a means of insuring the termination by dismissal of Petitioner's lawsuit.

The story begins with the reversal on August 13, 1986, by the Supreme Court of Ohio, of the dismissal by the court of appeals, of petitioner's petition for writ of mandamus to re-activate his case, *Levy v. Morrissey* (supra). After reactivation, settlement of claims against TIAA-CREF, and entry of final judgment, petitioner appealed the dismissal by summary judgment of his contract claims against UC (and the dismissal of other claims). The December letter (A35-A36) was part of the summary judgment record and arguments relating to it

were presented in petitioner's response to the motion for summary judgment and in the briefs on appeal (Appeal-1).

This case had come to the attention of the court of appeals no less than three times prior to Appeal-1 (first in 1978 when petitioner filed a premature appeal; second in 1984 when he appealed the dismissal of his refiled case; and third in 1985 when he filed his petition for writ of mandamus. See *Levy v. Morrissey*, supra), thereby giving it plenty of opportunity to notice that the December letter was part of the summary judgment record.

Even though no answer had been filed by UC, petitioner himself introduced the December letter into the summary judgment record as part of his opposition to Respondent's motion for summary judgment, thereby allowing it to be used against him. See *Simmons v. Peavy-Welsh Lumber Co*, 113 F 2d 812, 813, cert denied 311 U.S. 685, 61 S.Ct. 63, 85 L.Ed. 442 (litigant may be defeated by his own evidence, the pleader by his own exhibits). Since the court of appeals' conclusion (that the December letter was a novation) was based on the document alone (A7), which was in the record leading to Appeal-1, nothing in the subsequent "expanded record" made any difference.

The court of appeals thus had as much reason to call the December letter a novation and affirm the summary judgment in 1987 in Appeal-1 as it did in 1992 in Appeal-2, and save the parties five years of subsequent litigation.

However, if the court of appeals had affirmed the

summary judgment in 1987, petitioner would have been able to appeal to virtually the same Supreme Court of Ohio which reactivated his case in 1986. That court might not have looked kindly on a transparent excuse to nullify its order re-activating petitioner's case. The court of appeals therefore ignored the December letter and reversed the summary judgment (Appeal-1, A15-A26). By the time the case got back to it several years down the line, there would probably be a new Supreme Court of Ohio, which might not be so inclined to reverse its rulings.

In the meantime, to insure such an outcome and avoid law-of-the-case problems, the court of appeals arranged to have a member of the panel in Appeal-1 (and Appeal-2), the Honorable Rupert A. Doan, sit as a member of the Supreme Court of Ohio and write the opinion in the case of *Omlor v. Cleveland State University*, 45 Ohio St. 3d 187, 543 NE 2d 1238 (Ohio 1989), another, albeit dissimilar case involving academic tenure. When it came time to write the Decision in Appeal-2, the court of appeals could and did cite *Omlor* to overturn petitioner's claim to tenure, thus anticipating any argument that petitioner might make regarding the law of the case, *Nolan v. Nolan*, 462 NE 2d 410, 412 (Ohio 1984), syllabus (intervening decision by Supreme Court as overriding law of the case), *Pyramid Life Insurance Co. v. Curry*, 291 F2d 2d 411, 413 (questions necessarily involved as law of the case include those not expressly treated in opinion, as in Appeal-1).

In fact, *Omlor* (supra) is no more on point[4] than the December letter is a novation. Since petitioner's claim to tenure arises, not from a de facto theory, but from a written contract approved by the institution, the holding in *Omlor* that a faculty member cannot acquire tenure on a de facto basis where formal procedures for granting tenure exist,[5] is inapposite. It should be noted in connection with the *Omlor* case, that petitioner requested leave to file a supplementary brief on this issue, but his request was denied, again showing the "We don't know and we don't want to know" attitude of the court of appeals.

It is interesting to note in addition that Respondent UC waited until immediately after the *Omlor* decision (On August 30, 1989) to request an admission from petitioner that he had received the December letter (September 18,

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[4]Its value as authority in this case derives rather from its authorship.

[5]The matter of approval and authority was also discussed by the parties and the Court in Appeal-1. Moreover, as pointed out several times by petitioner, the by-laws of Respondent UC provide for exceptions and departures from their provisions.

1989). This was nearly two years after remand. The pins were falling into place. By the time the Decision in Appeal-2 was announced, on December 16, 1992, four of the six justices of the Supreme Court of Ohio that had voted to reactivate petitioner's case had left or were leaving the Court by the end of the year. The new Supreme Court of Ohio denied jurisdiction in the case on May 26, 1993.

Due process claims must also meet the test of legitimate government interest. The "touchstone of due process is protection of the individual against arbitrary action of the government," *Davidson v. Cannon*, 474 U.S. 344, 353, 106 S.Ct. 668,673, 88 L.Ed.2d 677 (1986). The test for determining whether government conduct is "arbitrary" is whether the law or action in question is rationally related to a legitimate government interest, *Epstein v. Township of Whitehall*, 693 F Supp 309, 313.

In this case the interest of the State of Ohio in denying due process to petitioner was nothing other than that of avoiding the expense of an adverse judgment. As Respondent UC's counsel put it in his closing remarks at the summary judgment hearing:

> "...was this man entitled to tenure or wasn't he, because, if he had to receive tenure from the University, they would be paying him for the next 30 years or whatever it is, so that's the real significant issue here..." (Emphasis added).

Such an interest can hardly justify denial of due process.

From beginning to end, namely during the thirty years from 1963 to 1993, Petitioner has been the victim of numerous clandestine maneuvers, first at the hands of Respondent University of Cincinnati, then joined by the courts of Ohio. A serendipitous and glaring illustration of this is found in an excerpt from the deposition (taken on March 9, 1989) of Louis Witten, the head of the UC physics department when Petitioner's employment was terminated in 1969. Petitioner was questioning deponent Witten about several employees of the UC physics department, some of whom had had heart attacks. Deponent Witten volunteered the following information:

A. He also had a bad coronary, so he doesn't want any undue stress.

Mr. Faller (attorney for UC): Is this something about the department that cause this?

Mr. Levy: I would like to mark the next --

The Witness: I think having to face Bob. (Emphasis added).

Not only that, but the "I think having to face Bob" line was omitted from the original transcript of the deposition prepared by the deposing officer. It was only because Petitioner insisted that the deposition be electronically recorded that he was able to get the transcript corrected.

It is easy to see why they did not want this case to go to trial.

The policy implications of this case for the integrity of the judicial system need not be stated since they speak for themselves. Upon its grant of certiorari, this Court should reverse the judgment of the Court of Appeals of Hamilton County because of its acts denying petitioner his constitutionally protected rights under the 14th amendment.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted and that the Hamilton County Court of Appeals' judgment be reversed.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-910751
TRIAL NO. A-756855

ROBERT A. LEVY,
Plaintiff-Appellant,

VS.

UNIVERSITY OF CINCINNATI
and ALLEN BROWN,
Defendants-Appellees.

DECISION

PRESENTED TO THE CLERK OF COURTS
FOR FILING DEC 16 1992
COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: December 16, 1992

Robert A. Levy, Pro Se, 1617-D N. Mesa Street, El Paso, Texas 79902,

Kenneth R. Faller, Esq., 0005568, 1200 Mercantile Center, 120 East Fourth Street, Cincinnati, Ohio 45202-4007, for Defendant-Appellee for Defendant-Appellee University of Cincinnati.

PER CURIAM .

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the briefs and oral arguments. The appellee, Allen Brown, did not file a brief or appear at oral argument.

Robert A. Levy ("appellant") entered the employ of the University of Cincinnati ("U.C.") as a Visiting Associate Professor of Physics for a term of one year from September 1, 1963, through August 31, 1964. His employment was pursuant to a letter from William R. Wright ("Wright"), dated June 10, 1963 ("June letter"). At that time, Wright was head of the Department of Physics at U.C. On December 2, 1963, Charles K. Weichert, Dean of the College of Arts and Sciences of U.C., advised the appellant that "his appointment as Visiting Associate Professor for the period 9/1/63 through 8/31/64 ha[d] been changed to that of Associate Professor of Physics" for the same period of time ("December letter"). That same letter reminded the appellant that the bylaws and regulations of

the board of directors[1] provided that the appointment of associate professors was for a term of three years or five years. The letter continued "[a]t the expiration of the initial five-year or second three[-]year appointment, if [the associate professor is] reappointed, [that person] shall have indefinite tenure * * *. In your case the three-year provision applies."

By letter dated October 18, 1968, in accordance with the bylaws and regulations of the board of directors ("bylaws"), Dean Weichert informed appellant that he would not be recommended for reappointment at the expiration of his second three-year term on August 31, 1969.

The within action was commenced on August 22, 1975. A second amended complaint was filed on June 4, 1990. Between those two dates much litigation had occurred providing two appeals to this court and one to the Supreme Court of Ohio. On November 4, 1991, the trial court entered summary judgment in favor of U.C. Claims against the other defendants had been settled or dismissed previously. Notice of appeal by Robert A. Levy was filed on October 15, 1991. Pursuant to App. R. 4(A), the

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[1] U.C., at the time, was a municipal university, the control of which was vested in a board of directors. R.C. 3349.01. When U.C. became a state university, its governance was vested in a board of trustees. R.C. 3361.01. The transition from municipal to state status was effective on July 1, 1977. See *Collins v. University of Cincinnati* (1981), 3 Ohio App. 3d 183, 444 N.E. 2d 459.

notice is treated as having been filed after the entry of summary judgment on November 4, 1991.

The appellant presents eight assignments of error. None has merit. We will consider the eight assignments in an order different from that in which they were presented by the appellant.

Fourth Assignment of Error

The appellant contends, in this assignment, that the trial court abused its discretion in granting leave for the immediate filing of the answer of U.C. and in denying his motion for partial summary judgment. He argues that no excusable neglect was shown for U.C.'s failure to file an answer within time and that the court abused its discretion in granting leave to file its answer, citing *Miller v. Lint* (1980), 62 Ohio St. 2d 208, 404 N.E. 2d 752. However, that case is factually dissimilar from the case we review.

On December 1, 1987, U.C. moved the trial court for leave to file its answer, at once, and served the appellant with notice of the motion. Neither of those conditions was present in *Miller v. Lint*, supra. In its memorandum in support of its motion for leave, U.C. noted the complex procedural history of the instant litigation as giving rise to the "excusable neglect" warranting the relief sought; in the *Miller* case there are no facts given which would justify a conclusion of excusable neglect. In the *Miller* case, a motion for default judgment preceded the effort to file an answer; in the instant case, the motion for leave to file the

answer antedated any effort by the appellant in reaction to the default. The Supreme Court observed in *Miller v. Lint*, supra, that "* * * the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment." *Miller v. Lint*, supra, at 215, 752 N.E.2d at 755. We agree, but, when the alleged error is that the trial court abused its discretion in the application of the procedural rules, we must review the factual basis to which the rules were applied. In doing so, we conclude that the ruling of the trial court was not "arbitrary, unreasonable or unconscionable" so as to be, in law, an abuse of discretion. *Ruwe v. Bd. of Springfield Twp. Trustees* (1987), 29 Ohio St. 3d 59, 61, 505 N.E. 2d 957, 959.

Having determined that the trial court did not abuse its discretion in permitting U.C. to file its answer, and the basis of appellant's motion for partial summary on the first count of the first amended complaint ("contract claim") being the absence of an answer by U.C., we conclude that the trial court did not err in denying partial summary judgment to the appellant.

The fourth assignment of error is overruled.

First Assignment of Error
Second Assignment of Error
Third Assignment of Error

We address these three assignments jointly.

Respectively, they protest: (1) the granting of summary judgment in favor of U.C.; (2) the denial of partial summary judgment in favor of appellant on his claim of breach of contract; and (3) the denial of partial summary judgment in favor of the appellant on this basis that his claim for the amount by which he was underpaid for his teaching services in the summer of 1964 was barred by the statute of limitations.

We have reviewed the second amended complaint and the answer thereto, together with the other evidentiary material which the trial court could, pursuant to Civ. R. 56(C), properly consider. We hold that the action of the trial court, in granting summary judgment in favor of U.C. and denying partial summary judgment in favor of the appellant, is free from error.

The appellant advances his first assignment of error by presenting five theories. First, he contends that there were genuine issues of material fact on his right to academic tenure. He bases his claim for tenure on the June letter which (1) offered to the appellant a one-year Visiting Associate Professor ship with compensation in the amount of $10,500 for the academic year from September 1, 1963, through August 31, 1964; (2) offered a regular appointment, if everything was mutually satisfactory, for the following year; and advised the appellant (3) that regular appointments were usually made for a period of three years and were renewable for a second three-year period; and (4) that "[a]t the end of that time the faculty member has tenure." The appellant's contention is that he,

having served two regular three-year appointments, was entitled to tenure by the language of the June letter. The flaw in the reasoning of the appellant results from his failure to recognize the legal significance of the December letter.

The December letter is more than a modification of the June letter; it entirely replaces the June letter. It establishes new rights and obligations and is, in legal effect, a contract of novation offered by U.C. and accepted by the appellant by his action of continuing to teach after the expiration of the period of employment established by the June letter. The December letter states that tenure is an incident attendant to reappointment after the second three-year period as associate professor. This statement is in accord with Section 39(a)(3) of the bylaws. Further, because U.C. has a formal tenure system, the only way that tenure may be obtained is by formal granting of the board of directors. See *Omlor v. Cleveland State Univ.* (1989), 45 Ohio St. 3d 187, 543 N.E.2d 1238, syllabus. The appellant, having been advised on October 8, 1968, in accordance with the bylaws, that he was not being recommended for reappointment at the end of his second three-year term as associate professor, has not met an essential condition precedent to his tenure.

As an additional theory, appellant contends that the June letter entitles him to professorial rank which, pursuant to the bylaws, would include the grant of tenure. This theory is without merit for at least two reasons. First, it is based on the June letter and, as we have concluded,

that letter was superseded by the December letter. Second, the appellant did not submit any evidentiary material to support his claim of entitlement to the promotion. He has not raised a genuine issue of material fact relative to his right to be promoted. *Wing v. Anchor Media, Ltd. of Texas,* (1991), 59 Ohio St. 3d 108, 570 N.E.2d 1095, paragraph three of the syllabus.

Appellant's third theory of error in the granting of summary judgment in favor of U.C. is based on an assertion of error as a matter of law arising from the application of the wrong statute of limitation to his claims for salary increases, summer-school compensation and incorrect payment for grant work. In addition, the appellant asserts that a genuine issue of material fact is presented by the statute-of-limitation defense unless the complaint clearly shows on its fact that the action is barred. The trial court applied the six-year period of limitation (R.C. 2305.07) applicable to contracts not in writing; the appellant argues that the correct period of limitation is the one applicable to written contracts (R.C. 2305.06), namely fifteen years.

Appellant attempts to support his position by contending that the bylaws are by implication terms of the June letter on the authority of *Rehor v. Case Western Reserve Univ.* (1975), 43 Ohio St. 2d 224, 331 N.E.2d 416, paragraph one of the syllabus. That case is inapposite because, as noted before, the June letter was superseded by the December letter.

The fourth theory upon which the appellant bases his first assignment of error relies on the statute of frauds, that is to say, because the alleged modification of the June letter relates to a condition which could not occur for more than one year and the appellant had not signed the modification the contract was unenforceable. The claim is without merit. The statute of frauds on oral agreements requires the signature of the party to be charged under the agreement. In the instant case U.C. had signed the December letter which superseded the June letter.

Finally, the appellant contends that genuine issues of material fact exist which make summary judgment in favor of U.C. inappropriate. We disagree. The records contains no evidence of any libelous or slanderous communication within the appropriate period of limitations as provided in R.C. 2305.11. The allegation by the appellant that U.C. had tapped his telephone and engaged in harassing conduct is likewise unsupported in view of the affidavits denying any such conduct. No genuine issue of material fact existed which would make summary judgment available to U.C.

In his second assignment of error, the appellant asserts that the trial court erred in overruling his motion for partial summary judgment. He predicates his argument on this court agreeing with his contention that the June letter controls. Because we have previously ruled that the June letter has no application, we hold this assignment to be without merit.

The third assignment of error protests the failure to grant appellant partial summary judgment on his claim for summer-school compensation. Appellant asserts that U.C. waived the statute of limitations and that, as a result, the court erred in denying his motion for partial summary judgment for that claim. The defense was set forth with sufficient clarity to overcome the claim of waiver.

The first, second and third assignments of error are over-ruled.

Fifth Assignment of Error

In the fifth assignment of error, the appellant protests the overruling of his motion for summary judgment on the first count his first amended complaint. This assignment of error is without merit.

The first count of the first amended complaint is the breach-of-contract claim. On December 1, 1987, the appellant moved for partial summary judgment on that count and the trial court overruled the motion of February 9, 1988.

The second amended complaint repeated, in its first count, the substance of the first count of the first amended complaint. The abandonment of the first amended complaint and a ruling based on the first amended complaint, even if erroneous, is mooted by the filing of the second amended complaint. In addition, the second assignment of error herein raised the same protest. We

hold the fifth assignment of error herein is subsumed in the second assignment and is therefore overruled. See *Parnell, Exrx. v. Bell* (1962), 117 Ohio App. 125 at 127, 191 N.E...2d 220 at 222, motion to certify record overruled (Mar. 6, 1963), No. 37857.

Sixth Assignment of Error
Seventh Assignment of Error
Eighth Assignment of Error

In the final three assignments of error, the appellant charges that the trial court abused its discretion in striking his demand for a jury trial (sixth assignment); in denying his motion to depose, on oral examination, a witness who had previously been deposed on written examination (seventh assignment); and in granting the motion filed by Allen Brown (eighth assignment). None of these assignments of error has merit.

Abuse of discretion "is readily defined as more than an error of law or judgment, but implies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable." *Ruwe v. Bd. of Springfield Twp. Trustees* (1987), 29 Ohio St. 3d 59, 61, 505 N.E.2d 957, 959. The record we review does not reflect an abuse of discretion in any of these assignments of error.

We have held in our discussion of the first assignment of error that the trial court did not err in granting summary judgment in favor of U.C. There were no genuine issues of material fact; there was no task for a jury to perform.

The witness from whom the appellant sought an oral deposition was apparently not in good health. That was the reason the initial deposition was taken on written examination. The record does not manifest that unreasonable, arbitrary on unconscionable attitude constituting an abuse of judicial discretion in the judge not allowing the witness to be deposed further on oral examination.

Finally, the appellant assigns abuse of discretion to the dismissal of the claim against Allen Brown for legal malpractice. On December 31, 1987, Brown sought leave to file his motion to dismiss. The motion and supporting affidavit were attached to the application for leave to file the motion. An entry granting Brown's motion to dismiss was journalized on February 27, 1988. The court held the claim of appellant was barred by the statute of limitations. The court further fond that although the motions and the time for hearing had been served by U.S. Postal Service on the appellant, he did not respond to the motion or appear at the hearing. There was no abuse of discretion. The sixth, seventh and eighth assignments of error are overruled.

The judgment of the trial court is affirmed.

DOAN, P.J., KLUSMEIER and UTZ, JJ.

PLEASE NOTE:

The court has placed of record its own entry in this case on the date of the release of this Decision.

(Filed November 4, 1991)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A756855

(HONORABLE JAMES W. KIRSCH, Visiting Judge)

ROBERT A. LEVY,
Plaintiff,

vs.

UNIVERSITY OF CINCINNATI
and ALLEN BROWN,
Defendants.

This matter came before the Court on April 22, 1991 for oral argument upon the motion of Defendant University of Cincinnati for summary judgment. The parties were afforded an opportunity thereafter to present additional briefs.

Having considered the arguments of Plaintiff pro se and counsel for the Defendant, University of Cincinnati, the briefs filed by the parties, and all affidavits and other evidentiary materials properly before the Court, and having construed the evidence most strongly in favor of the Plaintiff and against Defendant, the Court finds that,

with respect to Counts 1, 3, and 4 of Plaintiff's Second Amended Complaint, reasonable minds could come to but one conclusion, and that conclusion is adverse to the Plaintiff. Defendant University of Cincinnati is accordingly entitled to summary judgment on said counts as a matter of law. Said counts of the complaint comprising all of Plaintiff's claims pleaded against Defendant University of Cincinnati, summary judgment is hereby granted in favor of Defendant University of Cincinnati, and all of Plaintiff's claims against said Defendant are dismissed.The Court further finding that all claims against co-defendant Allen Brown have previously been dismissed, final judgment is hereby entered in favor of Defendant University of Cincinnati.

Costs are taxed against Plaintiff.

Honorable James W. Kirsch

Kenneth R. Faller, Esq., Attorney for Defendant
University of Cincinnati
BECKMAN, WEIL, SHEPARDSON & FALLER
1200 Mercantile Center, 120 E. Fourth Street
Cincinnati, Ohio 45202
(513) 621-2100

Robert A. Levy
Plaintiff pro se
1617-D North Mesa Street
El Paso, Texas 79902-3527
(915) 533-6413

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-860780
TRIAL NO. A-756855

ROBERT A. LEVY,
Plaintiff-Appellant,

vs.

UNIVERSITY OF CINCINNATI
and ALLEN BROWN,
Defendants-Appellees,

and

TEACHERS INSURANCE AND ANNUITY
ASSOCIATION
and
COLLEGE RETIREMENT EQUITIES FUND, ET AL.,
Defendants.

DECISION

FILED
COURT OF APPEALS
NOV 4 1987
CLERK OF COURTS

Civil Appeal from: Court of Common Pleas

Judgment Appealed from is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: November 4, 1987

Robert A. Levy, pro se, 1617-D N. Mesa Street, El Paso, Texas 79902,

Beckman, Weil, Shepardson & Faller and Kenneth R. Faller, Esq., Suite 1714, 105 East Fourth Street, Cincinnati, Ohio 45202, for Defendant-Appellee University of Cincinnati.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and oral arguments.[1]

Plaintiff-appellant Robert A. Levy (Levy), in the instant appeal, challenges the trial court's entry of judgment of dismissal on his tort claims against defendant-appellee the University of Cincinnati (UC), its entry of summary judgment for UC on his contract claim, and its entry of judgment of dismissal on his legal malpractice claim against defendant-appellee Allen Brown (Brown).

The record reveals that, in September of 1963, UC

employed Levy as an associate professor in its physics department. Levy continued at the university in that capacity until August of 1969, when he was denied tenure and the promotion to which he claimed entitlement and his employment was terminated. UC's denial of tenure and a promotion and the termination of his employment prompted Levy, in August of 1975, to institute an action against UC, in which he alleged breach of contract and asserted four separate counts sounding in tort. UC subsequently moved for dismissal of the tort claims on statute-of-limitations grounds and of the contract claim for the failure to state a claim upon which relief could be granted. In July of 1976, the court granted dismissal of Levy's tort claims but denied dismissal of his contract claim.

In August of 1976, Levy amended his complaint by leave of court to include a claim of legal malpractice against Brown, to add tort and contract claims against Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF), and to modify his allegations with respect to two of his tort claims against UC. UC and Brown moved separately for dismissal. By entry dated June 13, 1977, the court below granted dismissal of Levy's malpractice claim against Brown and again, with respect to Levy's allegations against UC, denied dismissal of the contract claim but granted dismissal of the tort claims, as amended, on statute-of-limitations grounds.

In August of 1977, UC moved for summary judgment

on the remaining contract claim. The court found the motion to be well taken and thus, on September 12, granted summary judgment in favor of UC. Levy subsequently moved for reconsideration and for an extension of time in which to respond to UC's motion for summary judgment. By entry dated November 16, 1977, the court denied Levy's motion for reconsideration and an extension and entered summary judgment in favor of UC.

From that judgment, Levy appealed. This court, however, found Levy's appeal to be premature and dismissed his initial appeal without prejudice for lack of finality. On November 3, 1986, the trial court dismissed Levy's remaining claims against TIAA-CREF, and Levy now brings this timely appeal in which he advances three assignments of error.

In his first assignment of error, Levy assails the trial court's entry of summary judgment in favor of UC on his contract claim. We find this challenge to be meritorious.

We note that UC has neglected to file an answer in response to either the original complaint filed in this matter or the complaint as amended. Civ. R. 7(A), which sets forth the required pleading of a complaint, makes provision for other optional pleadings, and mandates the respective responsive pleadings, provides that "[t]here shall be a complaint and an answer * * *." The effect of the failure to file the requisite responsive pleading may be determined under Civ. R. 8(D), which provides in relevant part that "[a]verments in a pleading to which a responsive

pleading is required * * * are admitted when not denied in the responsive pleading." UC responded to Levy's original complaint with a motion to dismiss and met his amended complaint with a second motion to dismiss and a subsequent motion for summary judgment. However, neither a motion to dismiss nor a motion for summary judgment is a "responsive pleading" to a complaint as contemplated under Civ. R. 7(A) and 8(D). See *Vernell v. Postal Service* (C.A. 5, 1987), 819 F.2d 108. Resultantly, under Civ. R. 8(D), the averments of Levy's complaint in support of his contract claim must be deemed admitted when UC has failed to controvert those averments by way of a responsive pleading.

Civ. R. 56 provides that a party against whom a claim is asserted may move, with or without supporting affidavits, for summary judgment in his favor on all or any part of the claim. Civ. R. 56(A). A motion for summary judgment may be granted if the court, upon viewing the inferences to be drawn from the underlying facts set forth in the pleadings, depositions, answers to interrogatories, written admissions, and affidavits in a light most favorable to the party opposing the motion, determines:

(1) that no genuine issue of material fact remains to be litigated;

(2) that the moving party is entitled to judgment as a matter of law; and

(3) that the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion.

Temple v Wean United, Inc. (1977), 50 Ohio St. 2d 317, 364 N.E.2d 267; Civ. R. 56(C).

Levy alleged in his amended complaint that he and UC entered into a contract of employment, pursuant to which he became entitled to tenure and a promotion upon completion of his second consecutive three-year term. Consistent with Civ. R. 10(D), Levy attached to his complaint a copy of a letter memorializing UC's offer of employment and a copy of his responsive letter in acceptance of employment in substantiation of the alleged terms of his employment agreement. Levy further alleged that UC breached this contract by failing, at the end of his second three-year term, to grant tenure or to promote him and by terminating his employment. In the absence of a responsive pleading to Levy's complaint, i.e., a timely filed answer, the averments of the complaint were not placed at issue and the facts alleged therein must be deemed to be admitted. Civ. R. 8(D). As a result, no genuine issue of material fact remains to be litigated. However, UC's implied admission that a contract existed and that UC breached that contract prevent a determination that UC was entitled to judgment in its favor as a matter of law.

UC's admissions may further be perceived as compelling the conclusion that Levy was entitled to judgment in his favor as a matter of law. However, Civ. R. 56 requires a determination that "the moving party is entitled to judgment as a matter of law" (emphasis added), and the Supreme Court of Ohio has held that this requisite

determination prevents courts from entering summary judgment in favor of a nonmoving party. *James R. Soda Inc. v. United Liberty Life Ins. Co.* (1986), 24 Ohio St. 3d 188, 494 N.E. 2d 1099; *Yurista v Nationwide Mut. Ins. Co* (1985), 18 Ohio St. 3d 326, 481 N.E.2d 584. Compare *State, ex rel. Cuyahoga County Hospital, v. Bureau of Workers' Compensation* (1986), 27 Ohio St. 2d 25, 500 N.E.2d 1370; *Houk v. Ross* (1973), 34 Ohio St. 2d 77, 296 N.E. 2d 266. Thus, despite our determination that no genuine issue of material fact remains to be litigated and that Levy may be perceived as being entitled to judgment in his favor as a matter of law, we are precluded from exercising our prerogative under App. R. 12(B) to enter summary judgment for Levy in the absence of a timely motion by Levy for summary judgment in his favor. Our disposition is, therefore, limited to a determination that the trial court erred in entering summary judgment in favor of UC on Levy's contract claim when, upon viewing the inferences to be drawn from the underlying facts set forth in Levy's pleading in a light most favorable to Levy, UC was not entitled to judgment in its favor as a matter of law. Accordingly, we sustain Levy's first assignment of error.

Levy in his second assignment of error, contends that the trial court erred in dismissing his tort claims against UC. We agree.

UC's failure to file an answer to Levy's complaint poses no impediment to the court's entry of judgment of dismissal on Levy's tort claims. The affirmative defense that plaintiff's action is barred by the applicable statute of

limitations may be asserted by a motion, filed pursuant to Civ. R. 12(B)(6), to dismiss the complaint for failure to state a claim upon which relief can be granted. *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St. 2d 55, 320 N.E. 2d 668. The Civ. R. 12(B)(6) defense of failure to state a claim upon which relief can be granted, if asserted by motion, must be advanced prior to the filing a responsive pleading.

Levy, in his original complaint filed in August of 1975, asserted four separate counts sounding in tort and alleged that this tortious conduct occurred during the course of his employment from September of 1963 through August of 1969. UC invoked the four-year statute of limitations set forth in R.C. 2305.09 in support of its motion to dismiss, and in July of 1976, the court entered judgment dismissing Levy's tort claims. Levy, by leave of court, subsequently filed an amended complaint in which he reasserted two of his four original tort claims against UC, charging harassment and defamation, and alleged with respect thereto continuous tortious conduct until and beyond August of 1974. UC again moved for dismissal on statute-of-limitations grounds, and the court again granted dismissal of Levy's tort claims.

Levy does not dispute the applicability of the four-year statute of limitations set forth in R.C. 2305.09 to the tort allegations advanced in his amended complaint. He contends, however, that R.C. 2305.09 does not operate to bar the tort claims in his complaint as amended when the tortious conduct was alleged to be continuous until and

beyond August of 1974.

UC in support of the court's entry of judgment of dismissal, cites the decision of the Court of Appeals for Cuyahoga County in *Solowitch v. Bennett* (1982), 8 Ohio App. 3d 115, 456 N.E.2d 562, for the proposition that a plaintiff, seeking to overcome a motion to dismiss his amended complaint, must demonstrate that he can marshal support for the new matter pleaded and that the amendment was neither sought for the purpose of delay nor prejudicial to the defendant. However, careful review of the decision in *Solowitch* discloses that the standard enunciated therein is limited in applicability to a plaintiff seeking leave to amend his complaint pursuant to Civ. R. 15(D). Civ. R. 15(A) confers upon a plaintiff an absolute right to amend his complaint without leave of court at any time prior to the filing of a responsive pleading or the entry of judgment dismissing his complaint. See *Bell v. Coen* (1975), 48 Ohio App. 2d 325, 357 N.E.2d 392. Following the filing of a responsive pleading or the entry of judgment of dismissal, the plaintiff may amend his complaint only by leave of court or by written consent of the adverse party. Civ. R. 15(D). When a trial court exercises its discretion to grant the plaintiff leave to amend his complaint, the allegations of the amended complaint supersede those of the original compliant. *LaBatt v. Twomey* (C.A. 7, 1975), 513 F.2d 641.

The court below, in July of 1976, following its dismissal of the tort claims advanced by Levy in his original complaint, granted Levy leave to file an amended

complaint. UC has not separately challenged the trial court's exercise of its discretion in granting Levy leave to amend his original complaint. Thus, the standard established in *Solowitch* is wholly inapplicable to the case at hand, and review of the court's dismissal of the tort claims asserted in Levy's amended complaint is governed by Civ. R. 12(B)(6).

In reviewing an entry of judgment of dismissal under Civ. R. 12(B)(6) on statute-of-limitations grounds, an appellate court must take the material allegations of the complaint as admitted, *State, ex rel. Alford, v. Willoughby Civil Service Commission*, (1979), 58 Ohio St. 2d 221, 390 N.E.2d 782, appeal after remand (1981), 67 Ohio ST. 2d 260, 423 N.E.2d 457, and will affirm the dismissal only if the complaint conclusively shows on its face that the action is barred by the statute of limitations. *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St. 2d 376, 433 N.E.2d 147. Levy filed his original complaint in August of 1975. In his amended complaint, he charged UC with tortious conduct continuing until and beyond August of 1974. Viewing the material allegations of Levy's amended complaint as admitted, we cannot say that the complaint on its face conclusively shows that Levy's tort claims are barred by the four-year statute of limitations. We, therefore, conclude that the court below erred in dismissing Levy's tort claims on statute-of-limitations grounds and, accordingly, sustain the second assignment of error.

In his third and final assignment of error, Levy

contests the trial court's entry of judgment dismissing his malpractice claim against Brown. Again, we find this challenge to be meritorious.

We note, as a preliminary matter, that Brown has failed to submit a responsive brief in this matter. App. R. 18(C) outlines the consequences to an appellee who fails to submit a brief within the time prescribed as follows:

> If an appellee fails to file his brief within the time provided by this rule, or within the time as extended, he will not be heard at oral argument except by permission of the court upon a showing of good cause submitted in writing prior to argument; and in determining the appeal, the court may accept the appellant's statements of the facts and issues as correct and reverse the judgment if the appellant's brief reasonably appears to sustain such action.

By entry dated June 13, 1977, the trial court granted Brown's motion to dismiss Levy's malpractice claim upon its determination that Brown wa not properly joined as a party to the action. Civ. R. 21 governs misjoinder and nonjoinder of parties and provides as follows:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage

> of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Thus, under Civ. R. 21, a court has the authority to remedy misjoinder by ordering that a party be dropped or that a claim be severed and proceeded with separately. However, the rule confers no authority upon the court to dismiss a claim for improper joinder. We, therefore, determine that the trial court erred in dismissing Levy's malpractice claim against Brown and, accordingly, sustain his third and final assignment of error.

Upon our determination that the trial court acted improvidently in entering summary judgment in favor of UC on Levy's contract claim, in granting judgment of dismissal for UC on Levy's tort claims, and in entering judgment of dismissal for Brown on Levy's malpractice claim, we reverse those portions of the judgment entered below and remand for further proceedings in accordance with law.

SHANNON, P.J., DOAN and UTZ, JJ.

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[1]Plaintiff-appellant Robert Levy appeared *pro se* and defendant-appellee University of Cincinnati was represented at oral argument by counsel, while defendant-appellee Allen Brown failed to file an appellate brief.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-910751

ROBERT A. LEVY,
Appellant,

vs.

UNIVERSITY OF CINCINNATI
and ALLEN BROWN,
Appellees.

ENTRY OVERRULING APPLICATION

This cause came on to be considered upon the application of the appellant filed herein for reconsideration and upon the response thereto, and

The Court being fully advised in the premises finds that said application is not well taken and that the same ought to be and hereby is overruled.

(COPIES SENT TO ALL COUNSEL)

TO THE CLERK:

ENTER UPON THE JOURNAL OF THE COURT 1/22/93

PER ORDER OF THE COURT.

BY: /s/ Rupert A. Doan

Presiding Judge

The Supreme Court of Ohio

1993 TERM
To wit: May 26, 1993
Case No. 93-301

Robert A. Levy,
Appellant,

v.

University of Cincinnati, et al.,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Hamilton County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS: Motion fee, $40.00, paid by Robert A. Levy

(Court of Appeals No. C910751)

/s/ Thomas J. Moyer

THOMAS J. MOYER
Chief Justice

UNIVERSITY OF CINCINNATI

Cincinnati 21, Ohio

Department of Physics

June 10, 1963

Dr. Robert A. Levy
7 KKL Street
Rehovot, Israel

Dear Dr. Levy:

Thank you for your letter of May 29. I have discussed with several deans your interest in a position here. For next year I can offer you a visiting associate professorship at a straight salary of $10,500 for the academic year. The rank and salary are those which we would offer on a regular appointment. If everything were mutually satisfactory, a regular appointment of an associate professorship would be offered you for the following year. Such appointments are usually made for a period of three years and are renewable for a second three year period. At the end of that time the faculty member has tenure. If promotion to a higher rank is made at any time during the probationary period, tenure is awarded automatically. In all negotiations for promotions and salary increases your one year on a visiting appointment would certainly be weighed just as heavily as a year during the probationary period. Promotions here have been made

at a fairly rapid rate; it is almost certain that you would receive a full professorship and academic tenure well before the end of the probationary period. I hope that I did not cause any misunderstanding by the use in my last letter of the word "permanent" instead of "regular". My explanation above should make the situation clear.

Please understand that in spite of all the red tape and legalistic word juggling in which I have had to engage in making you a formal offer, I am really looking for good people to fill permanent positions in this department. Since it has been impossible to interview you for the position, I am forced to exercise caution in order to satisfy the University Administration.

Our next academic year will be divided into three "quarters" of approximately ten weeks each. We are setting up a new sequence of three one-quarter "fast" courses in introductory quantum theory, nuclear physics, and solid state physics. Each "fast" course meets four times a week and is open to seniors and graduate students. The solid state course will probably cover the new "short" version of Kittel's book.

We are also greatly expanding our senior lab with the help of part of a $50,000 grant received from the NSF. We are especially anxious to build some solid state experiments for this lab. We will be able to build many experiments around a 7 inch Harvey-Wells research magnet, which we will buy for this purpose. This is in addition to the 12-inch magnet, which we are getting strictly for research.

If you accept my offer, I might ask you to teach a one-year graduate course in statistical mechanics. This has a co-requisite of quantum mechanics, and it actually covers some thermodynamics, quite a large amount of kinetic theory and transport theory, and classical and quantum statistical mechanics. A rough model for the course could be found in Kerson Huang's new book on statistical mechanics. I would also probably ask you to teach the "fast" solid state course during the spring quarter. During the autumn and winter quarters it would probably be easiest for you if you could help us develop the solid state experiments in the senior lab.

The University has a policy of giving up to $300 to help defray the expenses of moving the personal belongings of new associate professors. Although this policy does not ordinarily apply to visiting appointments, because of the special nature of this appointment, I am sure that something could be done to help you. If the University Administration cannot provide the $300, I can certainly take it out of a special fund which I control.

The University is located on top of a hill overlooking the Ohio river. The river valley can be seen from points near the campus. To the north of the campus and merging with it there is a large, heavily wooded city park. Hebrew Union College is on the western edge of the park. The Cincinnati Medical Center is several blocks east, and Xavier University is many more blocks further east. The areas to the south and east have decayed rapidly during the

past few years, but they are now in the gentle hands of the Urban Renewal Folk, so we have hope. The area to the north contains some of the loveliest old homes (and castles!) in the city. There are "California style" suburbs much farther north; these can be reached by a new super highway. There are many new apartments available near the University and there are several older homes for sale. Since I am a bachelor, I am not too well acquainted with the availability of houses for rent, but I am told that most such housing can be found in the areas quite far north.

Since Cincinnati has many hills and steep grades and "quaint" houses it does remind me somewhat of San Francisco - but a pretty dirty facsimile! There is an active cultural and social life which the natives pursue with a fervor that is sometimes frightening to behold. As for your comparison of Cincinnati and Cleveland, in all honesty I would have to say that the Cleveland Orchestra is better than the Cincinnati symphony. Since I have a strong, almost romantic attachment to San Francisco and a violent, unreasonable dislike for Los Angeles, I had better not pursue the comparison further.

I hope very much that you decide to accept my offer. We are very much in need of new people who will push new ideas and help us develop new programs. When I accepted my present position, I was sure that a really vigorous modern physics department could be built here in a short time. I will do everything in my power to help new faculty members build programs of interest to them. If you have any further questions, I would be happy to try to

answer them. I would be grateful if you would let me know at your earliest convenience whether or not you accept this offer.

Sincerely,

s/W.R. Wright

William R. Wright
Head, Physics Department

WRW:bs

P.S. Should you accept, would you kindly send me your social security number. We must have this for the official record of the appointment.

June 22, 1963

Professor William R. Wright, Head
Department of Physics
University of Cincinnati
Cincinnati 21, Ohio

Dear Professor Wright:

Thank you for your letter of June 10. After carefully considering your offer, I am happy to accept the appointment as visiting associate professor, and I am looking forward to joining the staff at Cincinnati.

I believe the program you suggested would be quite stimulating. Please let me know if there is anything I can do prior to my arrival. In this connection, when should I plant to arrive on the campus?

We have spent a very enjoyable year here in Israel, and we are now looking forward to getting back home.

Sincerely yours,

Robert A. Levy

P.S. My social security number is 465-34-0962

7 KKL Street
Rehovot, Israel

UNIVERSITY OF CINCINNATI
MCMICKEN COLLEGE OF ARTS AND SCIENCES
CINCINNATI 21, OHIO

OFFICE OF THE DEAN

December 2, 1963

Professor Robert A. Levy
1552 Reid Avenue
Cincinnati 24, Ohio

Dear Professor Levy:

Upon the recommendation of Professor William Wright and with the approval of the Board of Directors of the University of Cincinnati, it is my pleasure to advise that your appointment as Visiting Associate Professor of Physics for the period 9/1/63 through 8/31/64 has been changed to that of Associate Professor of Physics for the period 9/1/63 through 8/31/66. Your teaching and payroll basis will continue on a ten-months basis.

As you know, according to the By-Laws and Regulations of our Board of Directors, Associate Professors shall be appointed by the Board for a term of three years or five years. At the expiration of the initial five-year or second three year appointment, if they are reappointed, they shall have indefinite tenure within the age limits hereinafter set

forth. In your case the three-year provision applies.

Information regarding our T.I.A.A. retirement program and Old Age and Survivors Insurance (Social Security) was furnished in my letter of July 30, 1963. Should you wish further information about these matters, I shall be glad to explain them to you.

Sincerely yours,

s/Charles K. Weichert*

Charles K. Weichert, Dean

cc: Professor William R. Wright

*The signature was that of someone other than Charles K. Weichert

Supreme Court, U.S.
FILED

No. 93-285

In The

Supreme Court of the United States

October Term, 1993

ROBERT A. LEVY,

Petitioner,

vs.

UNIVERSITY OF CINCINNATI,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Ohio First Appellate District

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When an unpleaded affirmative defense is fully briefed by the parties in summary judgment proceedings, and where the parties have received full opportunity to introduce all evidence pertinent thereto, does an appellate court's reliance on the unpleaded affirmative defense as a ground of affirmance deny due process of law to a defendant against whom summary judgment was granted?

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STATEMENT OF THE CASE

The Petitioner served as an untenured associate professor of physics at the University of Cincinnati from 1963 to 1969.[1] His employment commenced pursuant to a letter dated June 10, 1963 (hereinafter the "June letter") from the head of the Department of Physics in the University of Cincinnati's College of Arts and Sciences. (Petitioner's App. 29-33). The material portions of the letter read as follows:

> For next year I can offer you a visiting *associate* professorship at a straight salary of $10,500 for the academic year. The rank and salary are those which we would offer on a regular appointment. If everything were mutually satisfactory, a *regular* appointment of an associate professorship would be offered you for the following year. Such appointments are usually made for a period of three years and are renewable for a second three year period. At the end of that time the faculty member has tenure. (Emphasis in original).

By letter dated June 22, 1963, the Petitioner responded that "I am happy to accept the appointment as visiting associate professor." (Petitioner's App. 34). At the time the Petitioner accepted the University's employment offer, visiting professorships were limited term appointments, with no expectancy of reappointment, and with no right to consideration for tenure under the University's formal, written tenure policy.

---

[1] The background facts recited herein are based upon the pleadings and the evidentiary record compiled in the summary judgment proceedings in the Court of Common Pleas.

The Petitioner commenced his employment with the University in September, 1963, and his colleagues in the Department of Physics apparently became enamored of him rather quickly. Accordingly, on November 7, 1963, the Dean of the College of Arts and Sciences proposed that the Petitioner receive a three-year regular faculty appointment in lieu of his one-year visiting professorship. The University administration acceded to this request, which resulted in a letter to the Petitioner from the Dean of the College dated December 2, 1963 (hereinafter the "December letter"). (Petitioner's App. 35-36). So far as is pertinent to the issues tried below, the December letter provided as follows:

> Upon the recommendation of Professor William Wright and with the approval of the Board of Directors of the University of Cincinnati, it is my pleasure to advise that your appointment as Visiting Associate Professor of Physics for the period 9/1/63 through 8/31/64 has been changed to that of Associate Professor of Physics for the period of 9/1/63 through 8/31/66. Your teaching and payroll basis will continue on a ten-month basis.
>
> As you know, according to the By-laws and Regulations of our Board of Directors, Associate Professors shall be appointed by the Board for a term of three years or five years. At the expiration of the initial five-year or second three-year appointment *if they are reappointed* they shall have indefinite tenure within the age limits

> hereinafter set forth. In your case the three-year provision applies. (Emphasis added).[2]

The conditions for tenure cited in the December letter were a verbatim recitation of the conditions set forth in Section 39(a)(3) of the by-laws and regulations of the board of directors of the University, which were in evidence in the trial court proceedings. Section 39(a)(3) was in effect at all times during the Petitioner's employment with the University.

As the Petitioner completed the second year of his initial three-year appointment to the regular faculty, the ardor of his colleagues had cooled substantially. On October 14, 1965, the head of the department of physics wrote to the Petitioner to express dissatisfaction with the Petitioner's research activities, which were not perceived as meeting the expectations of a faculty member brought to the university in a "senior position." The letter also stated that:

> I have recommended to Dean Weichert that you be reappointed for a three-year period. Since *another reappointment at the end of this period* would involve tenure, it is extremely important that you step up your research activities. (Emphasis added).

In accordance with the department head's correspondence with the Petitioner, on December 7, 1965, the dean

---

[2] The Petitioner asserts (Petitioner's Brief 3) that the December letter was "ostensibly signed by the dean, [but] the signature was not his." However, the record in the trial court established that the letter was sent by the dean's administrative assistant while he was out of town, and that she signed his name pursuant to authority granted by him.

of the college wrote to the Petitioner indicating that his "reappointment for the period 9/1/66 – 6/30/69 has . . . been approved."

On October 18, 1968, the dean of the college wrote to the Petitioner as follows:

> According to the By-laws and Regulations of the Board of Directors of the University of Cincinnati, a Faculty member not to be continued in service after the term of his appointment shall be notified by his Dean not later than November 1 of the academic year in which the probationary period expires.
>
> This is to inform you that you are not being recommended for reappointment for 1969-70.

In accordance with the communication of October 18, 1968, the Petitioner's appointment as an associate professor expired according to its terms on June 30, 1969, and he was not reappointed. Accordingly, the Petitioner had not met the conditions for an award of tenure as specified in the December letter, the department head's letter of October 14, 1965, or the pertinent provisions of the by-laws and regulations of the University's board of directors.

The Petitioner commenced his suit against the University in 1975. Thereafter, the litigation followed a tortious path which, in general, is accurately summarized in the Petitioner's Statement of Facts. (Petitioner's Brief 4-6). Although the Petitioner's suit urged numerous peripheral contract and tort claims, the overriding issue raised by him involved his claim of a contractual right to an award of tenure.

In the summary judgment proceedings that led to the final judgment now before this Court, the Petitioner urged that a literal reading of the June letter ("at the end of that time the faculty member has tenure") established his contractual right to receive tenure. The University, on the other hand, urged in its motion for summary judgment that the Petitioner's rights were governed not by the June letter, but rather by the December letter which had extended to him a three-year regular faculty appointment, in lieu of the original one-year appointment to a visiting professorship. Thus, the University's motion fully alerted the Petitioner to the University's reliance on the December letter as the controlling contractual document. The Petitioner's full understanding of the University's position was evidenced by his memorandum opposing the University's motion for summary judgment, in which he urged that the terms of the June letter remained in effect, and were not and could not be replaced by those of the December letter; that he did not consent or agree to the terms of the December letter; and that there was no consideration to support the December letter as a contractual document.

The Petitioner submitted his own affidavit and documentary evidence in support of his memorandum opposing the University's motion for summary judgment, and was free to submit any and all evidence that he believed supported the contentions argued in his memorandum. Following oral arguments, the trial judge permitted the Petitioner to submit an additional brief in support of his position. At the time the Petitioner filed his supplemental brief, he submitted additional evidentiary materials in

connection therewith, without objection by the University.

The University also independently argued in the summary judgment proceedings that under state law the University's formal, written tenure regulations precluded reliance by the Petitioner upon the terms of the June letter.[3]

The University's summary judgment motion was granted by the trial court by general entry. (Petitioner's App. 13-14). The Court of Appeals affirmed the trial court decision.[4] (Petitioner's App. 1-12).

So far as is pertinent to the matters raised in this Court, the Court of Appeals affirmed the trial court's summary judgment order on alternative and independent grounds. First, the Court of Appeals held that the December letter "establishes new rights and obligations and is, in legal effect, a contract of novation offered by U.C. and accepted by the appellant by his action of continuing to teach after the expiration of the period of the employment established by the June letter." (Petitioner's App. 7). Additionally, noting that the University had a formal

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[3] A prior motion for partial summary judgment by the University had been made without supporting evidentiary materials. That summary judgment decision favorable to the University was reversed by the First District Court of Appeals of Ohio and the unpublished decision is set forth in Petitioner's Appendix 15-26. Accordingly, neither the December letter nor the University's published tenure regulations had been authenticated and placed in evidence until the 1991 summary judgment motion of the University.

[4] The Court of Appeals decision is now reported as 84 Ohio App.3d 342 (1992).

tenure system, the Court of Appeals held that since Petitioner had "been advised on October 8, 1968, in accordance with the by-laws, that he was not being recommended for reappointment at the end of his second three-year term as associate professor, [he ha]d not met an essential condition precedent to his tenure," citing *Omlor v. Cleveland State University*, 45 Ohio St.3d 187, 543 N.E.2d 1238 (1989), syllabus. (Petitioner's App. 7).

The Petitioner's application for reconsideration, wherein he initially raised the due process claim now asserted before this Court, was overruled by the Court of Appeals. (Petitioner's App. 27). The Petitioner's appeal as of right to the Supreme Court of Ohio was dismissed for want of a substantial constitutional question.[5] (Petitioner's App. 28). Thereafter, the Petitioner timely prosecuted his petition for a Writ of Certiorari to this Court.

ARGUMENT

I. REASONS FOR DENYING THE WRIT OF CERTIORARI

The Ohio Court of Appeals Opinion evidences an alternative state law ground of decision which is adequate and independent, and which precludes Supreme Court review of the federal due process question.

The opinion of the Court of Appeals rests on alternative state law grounds. First, the court characterized the December letter as a "novation" which superseded the June letter. Second, the court held that, in accordance

[5] Reported at 66 Ohio St.3d 1484, 612 N.E.2d 1241 (1993).

with *Omlor v. Cleveland State University, supra,* the Petitioner's claim of entitlement to tenure was precluded by his failure to qualify under the University's formal tenure policy. The Petitioner recognizes the existence of these independent grounds for the opinion of the Court of Appeals. (Petitioner's Brief 9-10). The Petitioner's claim of surprise and consequent denial of his right to procedural due process relates only to the first stated ground of decision, and the Petitioner recognizes that the University asserted *Omlor* as a basis of decision in its summary judgment motion. (Petitioner's Brief 8).

This Court has long recognized that –

> where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S. Ct. 183, 80 L.Ed. 158 (1935).

Although *Fox Film Corp, supra,* and its progeny largely involve state court decisions resting on alternative federal and state law grounds, the limitation on jurisdiction long recognized by this Court should be not different where, as in the case at bar, the state court decision is grounded on two alternative and independent state law bases, only one of which is asserted to be invalid because of a procedural due process deficiency. For, as this Court has observed, "[b]y its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for

the state court's judgment. . . . " *Harris v. Reed*, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 103 L.Ed.2d 308 (1989).

In the case at bar, it is beyond question that there is an adequate and independent basis for the holding of the Ohio Court of Appeals. The two alternative grounds of decision are "[not] so interwoven . . . [so] as not to be an independent matter, [nor is the alternative ground of decision] not of sufficient breadth to sustain the judgment without any decision of the other. . . . " *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 61 L.Ed. 644 (1917).

Since the Ohio Court of Appeals based its decision on an adequate and independent state law ground, this Court should decline to issue a Writ of Certiorari.

II. QUESTION PRESENTED FOR REVIEW

When an unpleaded affirmative defense is fully briefed by the parties in summary judgment proceedings, and where the parties have received full opportunity to introduce all evidence pertinent thereto, does an appellate court's reliance on the unpleaded affirmative defense as a ground of affirmance deny due process of law to a defendant against whom summary judgment was granted?

The Petitioner correctly notes that the University did not expressly plead an affirmative defense of novation.[6]

---

[6] Ohio R. Civ. P. 8(C) requires that affirmative defenses be pleaded. The rule does not list contractual novation or any similar issue as being within the scope of the rule, nor do there appear to be any reported Ohio decisions which specifically

The University did, however, rely upon the December letter as the governing contractual document in its motion for summary judgment, and the significance of the December letter was vigorously litigated in those proceedings.

Ohio R. Civ. P. 15(B) is virtually identical to Fed. R. Civ. P. 15(b), and recognizes that issues may be tried by the implied consent of the parties.[7] The Supreme Court of Ohio has limited the scope of Ohio R. Civ. P. 15(B) to avoid undue surprise to litigants. In *State ex rel. Evans v. Bainbridge Township Trustees*, 5 Ohio St.3d 41, 448 N.E.2d 1159, 1160 (1983), first syllabus, the Supreme Court of Ohio set forth the following criteria:

> An implied amendment of the pleadings under Civ. R. 15(B) will not be permitted where it results in substantial prejudice to a party. Various factors to be considered in determining whether the parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue entered the case;

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determine contractual novation to be an affirmative defense within the meaning of Rule 8(C). However, the University concedes this point *arguendo*.

[7] Ohio R. Civ. P. 15(B) provides, in material part, that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise the issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of trial of these issues."

> whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory; and whether the witnesses were subjected to extensive cross examination on the issue.

Measured against these standards, there was ample reason for the Court of Appeals to conclude that the contractual significance of the December letter had been fully adjudicated in the summary judgment proceedings, that the Petitioner was not disadvantaged by surprise, and that his due process rights were not adversely affected by the judgment of the Court of Appeals.[8]

Under Ohio law, the elements of a contractual novation have been defined as including –

> a valid, prior obligation to be displaced; the consent of all the parties to the substitution; a sufficient consideration; the extinction of the old obligation; and the creation of a valid new one. *Garrett v. Lishawa*, 36 Ohio App. 129, 132, 172 N.E. 845, 846 (1930).

The University rested its summary judgment position in part upon the theory that the December letter was *the* definitive contractual statement of the conditions under which the Petitioner might achieve tenure. The Petitioner did not object to the introduction of the December letter in evidence. Instead, he responded in his initial memorandum opposing the University's motion for summary judgment by arguing that the December letter was of no

---

[8] These issues were before the Court of Appeals in the Petitioner's Application for Reconsideration.

contractual significance because the June letter remained in effect and was not and could not have been replaced by the terms of the December letter; that he did not consent or agree to the terms of the December letter; and that there was no consideration to support the December letter. In short, the Petitioner fully and forcefully argued the subsidiary issues relevant under Ohio law to a determination of whether a contractual novation had occurred. Moreover, subsequent to filing his initial brief, the Petitioner was given the opportunity by the trial court, and availed himself of the opportunity, to file an additional brief and introduce additional evidentiary materials.[9]

Accordingly, the Court of Appeals was not remiss in its implicit determination that the Petitioner fully recognized that the contractual significance of the December letter was at issue, and that he not only had a full and fair opportunity to address the pertinent issues with arguments and evidence, but availed himself of the opportunity to do so. *Bainbridge Township Trustees*, 5 OhioSt.3d at 41, 448 N.E.2d at 1160.[10] While it is true that the word "novation" did not appear in these proceedings until the Court of Appeals issued its decision, that word is not a

---

[9] The Petitioner at no stage of these proceedings has shown what additional arguments he might have tendered, or what additional evidence he might have adduced, had the University explicitly characterized the December letter as a novation in its summary judgment motion.

[10] The third factor discussed by the Supreme Court of Ohio in *Bainbridge County Trustees*, cross examination pertinent to the unpleaded issue, is clearly inapplicable where the issue tried by the implied consent of the parties occurs in a summary judgment proceeding.

magic incantation which transformed the nature of the proceedings in the trial court. The Petitioner himself having addressed at the trial level the pertinent issues of a novation theory, he cannot now be heard to claim that he lacked notice and an opportunity to defend.[11]

---

[11] The "aggravating circumstances" recited by the Petitioner (Petitioner's Brief 17-23) require little comment. They are of a piece with the allegations of his original complaint that the University colluded with "federal, state, local and private agencies" to subject him and his family to a "continuous program of harassment and illegal surveillance, including electronic eavesdropping, wiretapping, following, breaking and entering and burglary." The Petitioner's unproved, ultimately unprovable, and scandalous allegation that the Ohio courts have entered a conspiracy to deprive him of his rights adds nothing to his case, and is unworthy of this Court's consideration.

CONCLUSION

For the reasons set forth in this brief, an adequate and independent state law decisional ground precludes review by this Court, and, on the merits, the Petitioner is unable to show the claimed deprivation of his due process rights. The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 93-285

In The

Supreme Court of the United States

October Term, 1993

ROBERT A. LEVY,

Petitioner,

vs.

UNIVERSITY OF CINCINNATI,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Ohio First Appellate District

REPLY TO OPPOSITION TO WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S ARGUMENT

I. DID THE PARTIES LITIGATE THE ISSUE OF NOVATION?

Ultimately the only way this Court can determine what issues the parties litigated in the trial and appellate courts is by examining the record. Nevertheless, substantial evidence exists that they did not litigate novation:

A. Language used by the Decision of the Court of Appeals[1]

The Court of Appeals' Decision said:

> "The flaw in the reasoning of the appellant results from his failure to recognize the legal significance of the December letter.
>
> "The December letter is more than a modification of the June letter; it entirely replaces the June letter, and is, in legal effect, a contract of novation offered by U.C. and accepted by the appellant by his action of continuing to teach after the expiration of the period of employment established by the June letter" (Petitioner's Appendix, A7).

The phrase "his failure to recognize the legal significance of the December letter" suggests that the Court of Appeals itself did not believe the issue of novation[2] had been litigated, certainly that the petitioner did not realize

---

[1] The Court of Appeals decision is now reported as 84 Ohio App 3d 342, 616 NE 2d 1132 (Ohio App 1 Dist 1992).

[2] It would also go a long way toward proving that the December letter in fact was not a contract of novation.

it had been litigated. See quotation from *State ex rel. Evans v. Bainbridge Township Trustees*, 5 Ohio St 3d 41, 448 NE 2d 1159, 1160 quoted by Respondent (Respondent's Brief 10): "whether they recognized that an unpleaded issue entered the case."

The explanation following, namely, "it entirely replaces the June letter, and is in legal effect a contract of novation" addresses both parties, implying that it was only the Court of Appeals who realized the December letter was a novation, and it was teaching the parties what the case was about.

There is no language such as "we agree with respondent's contention that the December letter replaced the June letter," which would indicate that the issue had been litigated.

B. Characteristics of a novation theory

A novation is a special kind of contract, with several features advantageous to the person claiming it.

1. Because it replaces the earlier contract entirely, it is as if the earlier contract never existed. The Court of Appeals in its Decision took advantage of this by overturning several of petitioner's secondary claims based on the June letter (Petitioner's Brief 15). *But respondent did not avail itself of this advantageous feature* in its arguments, either in the trial court or in the appellate court.

2. Secondly, a contract of novation needs no separate consideration to be valid, since the relinquishment of the earlier obligation serves as consideration for adoption of the later obligation, *Baker v. All States Life Insurance Co.*,

96 NE 2d 787 (1950). The Court of Appeals implicitly recognized this by not addressing the issue of consideration.

The lack of consideration was petitioner's primary argument against the notion that the December letter had any contractual significance. Respondent could have answered petitioner's argument by noting that in a novation the relinquishment of the former contract serves as consideration for the new contract, citing authorities such as *Baker* (supra). But again, *respondent did not utilize this effective argument*. Instead, respondent relied on a unilateral contract theory.

C. Language utilized by the parties

Petitioner can find no use by either party, in the summary judgment or appellate proceedings, of the following words or phrases: in lieu of, replace, cancel, displace, substitute, supercede, or novation (which respondent concedes was never used). Respondent has attempted throughout its Brief in this Court to characterize the arguments in the courts below in terms of these expressions in order to make it appear that novation was litigated, but said words are nowhere to be found in the record. It was not until after the Court of Appeals' Decision of December 16, 1992, that respondent rephrased the earlier arguments in terms of replacement and substitution.

Respondent urged a unilateral contract theory in its arguments. Petitioner argued on the basis of a modification theory, which was fatally flawed by the lack of

consideration. These were the issues the parties recognized, not novation.

A negative is difficult to prove, but all of the above-mentioned indicators suggest that the issue of novation was not litigated by the parties.

D. Argument and evidence regarding novation.

If novation had been an issue in the trial court (Respondent's Brief 12, Ftn 9), petitioner would have argued that the December letter is incomplete (it does not even state petitioner's salary); that it evidences continuity rather than discontinuity; that it requires reference to earlier correspondence; that it lacks notice that the June letter was to be superceded; that it deals with only one issue; that intent, knowledge, and consent could not be established as a matter of law; that separate consideration was necessary because respondent was already bound, making a novation theory inapplicable (See *King Construction Co. v. W.M. Smith Electric Co.*, 530 SW 2d 940, 946 and cases cited therein); that the law of the case eliminated the December letter as a novation. Some of these arguments are summarized in his brief (Petitioner's Brief 15).

As additional evidence, Petitioner would add statements to his affidavit concerning his state of mind at the time he received the December letter: that he regarded the December letter as notice of his first re-appointment pursuant to the June letter; that not having the dean's signature on the December letter made him think that the statements therein concerning tenure could be mistaken and possibly mischievous remarks of whoever it was that

sent the letter; that it would have been dangerous for him to inquire about the puzzling aspects of the December letter; that it never occurred to him that the December letter could constitute a replacement of the June letter.

He would have included as an additional exhibit a letter dated May 23, 1963, dealing with the teaching load.

Because novation theories generally require no separate consideration, the elements of intent, knowledge, and consent to a substitution assume primary importance, *Bolling v. Clevepak Corp.*, 484 NE 2d 1367 (Ohio App 1984). Petitioner should have an opportunity to raise an issue of fact concerning these questions.

II. THE ALTERNATIVE STATE LAW GROUND DOES NOT SUFFICE TO PRECLUDE SUPREME COURT REVIEW OF THE FEDERAL QUESTION.

Contrary to the implication of respondent's argument, it is not enough that an alternative state law ground be merely asserted to preclude this Court from reviewing the federal question. Whether or not this Court has jurisdiction to review the case, this Court does have jurisdiction to "ascertain for itself whether the asserted non-federal ground independently and adequately supports the judgment," *Michigan v. Long*, 103 S.Ct. 3469, 463 US 1032, 77 L Ed 2d 1201 (1983). Although it is doubtful that the "plain statement" rule adopted in *Michigan* would apply in this case because no federal question was initially presented to the state court before it made its decision, nevertheless it is clear that the asserted alternative state law ground is inadequate.

A. The asserted alternative state law ground of decision lacks the breadth to preclude Supreme Court review of the federal due process question.

The case of *Omlor v. Cleveland State University*, 45 Ohio St 3d 187, 543 NE 2d 1238 (Ohio 1989) was decided on narrow grounds. It held that a faculty member could not obtain tenure on a *de facto* basis when the institution had a formal tenure policy which permitted tenure only according to its terms, syllabus (Petitioner's Brief 7). This holding is not broad enough (See *Enterprise Irrigation District v. Farmers Mutual Canal Co*, 243 US 157, 164, 37 S Ct 318, 61 L Ed 644, 648) to apply to petitioner's situation because, as set forth in his Petition (Petitioner's Brief 20), his right to tenure derives not from a *de facto* theory but from a written contract (the June letter) between him and his institution[3]. The only way *Omlor* could be an adequate ground of decision would be if the December letter were indeed a novation, thereby leaving petitioner's claim to tenure resting only on the basis of his years of service, a *de facto* theory. But in that event, the alternative state law

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[3] Additionally, *Omlor* fails to support the judgment of the court of appeals because it is applied retrospectively to petitioner's contract, made twenty-six years earlier. Since the Decision in Appeal-1 (Petitioner's App 20) established the contractual rights set forth in the June letter, *Omlor* comes within the one general exception to the rule of retroactive application of judicial decisions, namely, when contractual rights have been acquired under a prior decision, *Muhlker v. New York & H. R. Co.*, 25 S Ct 522, 197 US 570, 49 L Ed 872, 878 (1905), *Sauer v. New York*, 27 S Ct 686, 206 US 536, 549, 51 L Ed 1176, 1183 (1907), *Zagorski v. South Euclid-Lyndhurst Board of Education*, 471 NE 2d 1378 (Ohio 1984), Ohio Constitution, Art. II Sec 28.

ground would not be independent, since it would depend on the other ground, which is challenged on federal due process grounds.

B. The asserted state law ground was insufficiently developed or articulated in the Decision to preclude Supreme Court review of the federal question.

The Decision of the Ohio Court of Appeals enunciated the alternative state law ground as follows:

> "Further, because U.C. has a formal tenure system, the only way that tenure may be obtained is by formal granting of the board of directors. See *Omlor v. Cleveland State Univ.* (1989), 45 Ohio St. 3d 187, 543 N.E. 2d 1238, syllabus" (Petitioner's App A7).

From this statement it is not clear whether or not the court of appeals intended the alternative ground to be independent[4]. Even though the plain statement rule may not apply here, something more than a single assertive sentence is needed to avoid ambiguity, *Michigan v. Long*, (supra), (ambiguous or obscure adjudications by state courts cannot stand as barriers to a determination by the United States Supreme Court of the validity under the

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[4] It is also likely that this state ground is "a mere device to prevent a review of the decision upon the Federal question," *Enterprise Irrigation District v. Farmers Mutual Canal Co.* (supra), 61 L Ed at 649, in view of the circumstances set forth in the Petition (Petitioner's Brief 19), every word of which, in response to Respondent's remarks (Respondent's Brief 13), petitioner stands behind, including the intentional tort allegations of his original complaint.

federal Constitution of state action). The fact that petitioner *arguendo* may have treated the alternative state law grounds as independent (Respondent's Brief 8) does not make them so. It is what the Court's opinion says that matters, and in this case it says very little. It is interesting to note that the headnotes in the reported opinion, *Levy v. University of Cincinnati*, 616 NE 2d 1132 (Ohio App 1 Dist 1992) do not even mention an alternative ground of decision.

CONCLUSION

For the above-mentioned reasons the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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